

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-000846-WC

BILLY TUSSEY, ADMINISTRATOR OF  
THE ESTATE OF JAMES E. TUSSEY,  
DECEASED

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-04-00139

COOK FAMILY FOODS, LTD;  
HON. JAMES L. KERR, ADMINISTRATIVE  
LAW JUDGE; and WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: TAYLOR AND VANMETER, JUDGES; POTTER, SENIOR JUDGE.<sup>1</sup>

POTTER, SENIOR JUDGE: At issue in this appeal is the propriety of the dismissal of appellant's claim for benefits stemming from the death of James Tussey on the basis that he unreasonably failed to follow medical advice. Because we fully concur in the

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<sup>1</sup> Senior Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

well-reasoned analysis of the Worker's Compensation Board in affirming the dismissal, we affirm its decision in this case.

On December 21, 2001, James Tussey sustained a work-related knee injury for which he underwent arthroscopic surgery which included the removal of multiple loose bodies and debridement of the medial femoral condyle. The procedure was performed by Dr. T. Robert Love, an orthopedic surgeon. Mr. Tussey subsequently developed pain in his right calf and on January 11, 2002, someone claiming to be his wife contacted Dr. Love's office by telephone to report that Mr. Tussey was experiencing pain. A medical assistant in Dr. Love's office advised the caller that Mr. Tussey should immediately undergo an ultrasound to determine if he was developing deep vein thrombosis or blood clotting, a dangerous and potentially fatal complication of the surgery. The caller was placed on hold while the medical assistant contacted Bellefonte Hospital, a facility adjacent to the doctor's office, to arrange for an ultrasound for Mr. Tussey. The medical assistant then informed the caller that the hospital would perform the ultrasound as soon as Mr. Tussey could arrive at the hospital, emphasizing the serious nature of the situation and explaining that a blood clot could travel to the heart or lungs precipitating a stroke or death. When the caller expressed uncertainty whether she could convince Mr. Tussey to go to the hospital for the procedure, the

medical assistant then spoke with Mr. Tussey reiterating the seriousness of the situation and the necessity of having the ultrasound procedure right away. Mr. Tussey then indicated that he would make arrangements to get a ride to the hospital for the procedure. The medical assistant testified that she had no further contact with Mr. Tussey and assumed that he had followed her directions.

Three days later, on Monday, January 14, 2002, Dr. Love's office manager received a call from King's Daughter's Medical Center advising her that Mr. Tussey had been brought to that facility that morning and had later died of a pulmonary embolism. Dr. Love's office then contacted Bellefonte Hospital to obtain a report on the ultrasound procedure they assumed Mr. Tussey had undergone the previous Friday and were informed that he had never appeared for the procedure. Dr. Love testified that calf tenderness is a "cardinal sign of a blood clot" and that had Mr. Tussey's ultrasound indicated the presence of a blood clot in his leg he would have been treated with blood thinners which greatly reduce the risk of a pulmonary embolism. Although Dr. Love acknowledged that use of blood thinners would not entirely eliminate the possibility of developing an embolism, he stated that in 17 years of practice he had never lost a patient from a pulmonary embolism resulting from a post-surgical blood clot and that he was not aware of any other

patient who had failed to undergo the testing and standard protocol for addressing development of blood clots. When asked if he considered it unreasonable for Mr. Tussey to have failed to undergo the ultrasound procedure which had been set up for him, Dr. Love responded, "Yes, I mean, it's patently obvious, considering the circumstances, that this was the wrong decision."

On the basis of these and other factors, the Administrative Law Judge dismissed the claim for death benefits pursued by Mr. Tussey's estate on the basis that his death was the result of an unreasonable failure to follow medical advice. An appeal to the Board produced a thorough and well-reasoned opinion which we find dispositive of the issues advanced in the appeal to this Court. Because we are convinced that we can add little, if anything, to the Board's analysis, we adopt the following portion of its opinion as our own:

"On appeal, Tussey's estate argues there is no substantial evidence of record to support the ALJ's finding of an unreasonable failure to follow medical advice and that there is no substantial evidence that any such failure was the cause of death. Though we greatly sympathize with the Tussey family over their tragic loss, we are bound to affirm. As correctly noted by the estate, the unreasonable failure to follow medical advice is an affirmative defense under KRS 342.035 for which the

burden of proof rested with Cook. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334, 336 (Ky.App. 1995). Because Cook was successful before the ALJ, the question before us is whether his decision is supported by substantial evidence of record. Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000). In answering this question, we are mindful that the ALJ, as fact-finder, and not this tribunal, has the sole discretion to determine the quality, character and substance of the evidence. Paramount Foods, Inc., v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985). This Board may not substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact. KRS 342.285(2).

"The ALJ correctly noted the legal standard applicable to his analysis of the facts pertaining to Tussey's alleged unreasonable failure to follow medical advice. That legal standard is comprised of three factors, described by the court of appeals in Luttrell v. Cardinal Aluminum Co., supra, as follows:

In Teague v. South Central Bell, Ky.App., 585 S.W.2d 425 (1979), this Court set forth the two elements necessary to establish an affirmative defense pursuant to KRS 342.035(2): 1) failure to follow medical advice and 2) the failure must be unreasonable. A third factor is whether the unreasonable failure caused disability. Elmendorf Farms v. Goins, Ky.App., 593 S.W.2d 81 (1979). The determination of whether the failure to follow medical advice is unreasonable is a question of fact for the ALJ. Fordson Coal Co. v. Palko, 282 Ky.

397, 138 S.W.2d 456 (1940). Refusal to submit to treatment is unreasonable if it 'is free from danger to life and health and extraordinary suffering, and, according to the best medical or surgical opinion, offers a reasonable prospect of restoration or relief from the disability.' Id.

"Tussey's estate relies heavily on the court of appeals' holding in Teague, supra, cited in Luttrell, supra, above. Indeed, there is little more substance to the estate's argument than might be summarized by the phrase 'so there, so here.' Unfortunately for Tussey's estate, Teague, supra, is distinguishable from the case sub judice. The dispositive facts in Teague were summarized by the court as follows:

Dr. Sloan testified that he examined Teague and diagnosed his condition as superficial thrombophlebitis. He recommended hospitalization, which Teague refused, and Dr. Sloan consented to treat Teague as an outpatient 'against my better judgment.' At the second examination, Dr. Sloan noted some improvement and recommended Teague continue the prescribed course of treatment. On August 25, one day prior to an appointment with Dr. Sloan, Teague died.

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Dr. Sloan testified that he recommended hospitalization, which Teague refused, and therefore Dr. Sloan consented to treat Teague as an outpatient 'against my better judgment.' In an exhibit attached to Dr. Sloan's deposition, he stated: 'He was advised to be hospitalized but he refused. He was treated with Orenzyme and Tandearil, but was not given anticoagulants which would have been done in the hospital. (The purpose

of anticoagulants in phlebitis is the prevention of pulmonary embolism.)'

Whether KRS 342.035(2) bars recovery in this instance turns on the question of whether Teague's actions were reasonable in view of the knowledge he possessed concerning his injury. We note that Dr. Sloan's statements concerning a prescribed treatment of anticoagulants if Teague were hospitalized and that he treated Teague as an outpatient against his better judgment were both made subsequent to decedent's death. There is nothing in Dr. Sloan's testimony indicating that these facts were conveyed to Teague. A doctor's knowledge or assumption of probable results cannot be imputed to the patient unless the patient is so notified. There is nothing in the record indicating that Teague was ever aware of the gravity of his condition.

Mrs. Teague testified that her husband followed the advice of Dr. Sloan; i.e., he took the prescribed medication, applied heat to the injury and kept the leg elevated. No testimony in the record reveals that Teague was told that his course of treatment if hospitalized would differ from the treatment he followed at home. Teague's conduct simply contains no element of unreasonable failure to follow medical advice.

"Unlike Teague, supra, there is proof in the case sub judice that Tussey was notified of the need to undergo the ultrasound arranged for him at Bellefonte Hospital, and of the potentially fatal consequences of his failure to get treatment. In Teague, supra, it was significant that Dr. Sloan acquiesced in the claimant's decision not to be hospitalized. Basically,

Dr. Sloan undertook an alternative course of treatment, with which the claimant was compliant. Such is not the case here. Dr. Love and his office staff emphasized to Tussey repeatedly the risk of post-surgical blood clotting and the serious potential complications thereof, including pulmonary embolism and death. When Tussey contacted Dr. Love's office to report pain in his calf, he was specifically instructed to go to Bellefonte Hospital, where arrangements had been made for him to undergo an ultrasound to check for blood clotting in his leg. No alternative course of treatment was requested or offered. It was understood that Tussey would find a ride to the hospital, and he never gave any indication that he would not or could not comply with this directive.

"Moreover, there is no evidence to suggest that undergoing the ultrasound or taking the blood thinners that would have been prescribed to address clotting would have posed a danger to Tussey's life or health, or extraordinary suffering. See Luttrell v. Cardinal Aluminum Co., supra (quoting Fordson Coal Co. v. Palko, supra). It was standard protocol that had been followed without known incident on dozens or more of Dr. Love's patients post-surgically. Furthermore, the testimony of Dr. Love establishes within a reasonable degree of medical probability that the treatment offered a "reasonable prospect of restoration or relief" from the clotting that resulted in the

pulmonary embolism from which Tussey died, as will be further discussed below. Id. Thus, the testimony of Dr. Love, McDaniel and Davis combine to form substantial evidence that Tussey's failure to follow medical advice was unreasonable.

"We believe the testimony of Dr. Love is also sufficient to prove that Tussey's unreasonable failure to follow medical advice was the cause of his death. Notwithstanding the estate's argument to the contrary, the likelihood that the recommended treatment would have been successful in preventing Tussey's fatal pulmonary embolism is more than mere "implication or supposition." Dr. Love testified that Tussey's pulmonary embolism was "an entirely preventable event" in light of the three-day warning in the nature of calf tenderness. The doctor went on to state, in explicit and definite terms, 'Calf tenderness is the sign of deep venous thrombosis. And deep venous thrombosis, if left untreated, will go to the lung, and that causes pulmonary embolism.' Tussey's death certificate, attached as an exhibit to Dr. Love's deposition, indicates that he died of a pulmonary embolism. We believe it was reasonable for the ALJ to infer from Dr. Love's testimony that the pulmonary embolism probably could have been avoided with early detection via ultrasound and treatment with blood thinners. It is important to note that "medical advice" for purposes of KRS 342.035(2) 'encompasses advice from medical professionals that,

if followed, would have prevented further injury or disability, in addition to specific advice concerning treatment of an injury or disease.' Arvin v. Mountain Construction Co., 2003-CA-001214-WC, 2003 WL 22803291 (Ky.App. 2003)(citing Allen v. Glenn Baker Trucking, Inc., 875 S.W.2d 92, 94 (Ky. 1994)). The instructions received by Tussey fall squarely within this definition. His failure to follow the medical advice given to him was unreasonable and led to his unfortunate and untimely death."

Accordingly, the opinion of the Workers' Compensation Board is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Robert W. Miller  
Grayson, Kentucky

BRIEF FOR APPELLEE COOK FAMILY  
FOODS, LTD:

Gregory C. Shields  
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BRIEF FOR APPELLEE WORKERS'  
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William Emrick  
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